Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

87-136

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

George E. Spagnuolo,

Petitoner,

v.

United States of America,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nicholas Smith (P20697)
Attorney for Petitioner,
16000 W. Nine Mile Rd.,
Ste. 114
Southfield, Mi 48075
Phone: (313) 557-5599

QUESTIONS PRESENTED FOR REVIEW

I.

DID THE COURT OF APPEALS, AFTER HOLDING THE BRIEFING SCHEDULE IN ABEYANCE PENDING A HEARING ON PETITIONER'S MOTION FOR A NEW TRIAL AND ALLOWING THE SUPPLEMENTATION OF THE RECORD ON APPEAL, ERR IN NOT FULLY CONSIDERING THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL RAISED ON APPEAL AND IN THE MOTION FOR NEW TRIAL SOLELY ON PROCEDURAL GROUNDS?

II.

DID THE COURT OF APPEALS ERR IN AFFIRMING PETITIONER'S CONVICTION WHERE THE DISTRICT COURT ALLOWED THE TESTIMONY OF SIMILAR ACTS EVIDENCE IN VIOLATION OF THE FEDERAL RULES OF EVIDENCE AND FEDERAL CASE LAW?

LIST OF PARTIES

The parties in this proceeding in the United States Court of Appeals were as follows:

1. George E. Spagnuolo,
Defendant-Appellant.

2. United States of America,
Plaintiff-Appellee.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

George E. Spagnuolo,

Petitoner,

v.

United States of America,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, George E. Spagnuolo, by his attorney, Nicholas Smith prays that a Writ of Certiorari issue to review the Judgment entered against him by the U.S. Court of Appeals for the Sixth Circuit filed on February 20, 1987, and further denied a Petition for Rehearing on May 7, 1987.

OPINIONS AND ORDERS BELOW

The Judgment and Commitment Order of the United States District Court for the Eastern District of Michigan, Northern Division, is unreported, but is set forth in Appendix I. The Order of District Judge James P. Churchill Denying Motion for New Trial and Findings of Fact and Conclusions of Law with Respect to Motion for New Trial is unreported, but is set forth in Appendix G.

The Order of the United States Court of Appeals for the Sixth Circuit Denying Defendant's Motion to Remand is set forth in Appendix D. The Order holding the briefing schedule in abeyance pending a decision of the District Court on a Motion for a New Trial is set forth in Appendix E.

The Opinion of the United States Court of Appeals for the Sixth Circuit is unreported, but is set forth in Appendix B. The Order of the Sixth Circuit Court of Appeals Staying the Mandate is set forth in Appendix F herein. The Order Denying Petitioner's Motion for Rehearing is set forth in Appendix C.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 20, 1987. An Order denying the Petition for Rehearing was entered on May 7, 1987, by the United States Court of Appeals for the Sixth Circuit. The time for filing a Petition for Writ of Certiorari continues to July 7, 1987. The jurisdiction of the Court is invoked under Title 28, U.S.C. §1254(1).

STATEMENT OF THE CASE

A true bill of indictment was issued by the Grand Jury on March 22, 1984, which charged Defendant with one count of Conspiracy to Distribute Cocaine with Intent to Distribute, in violation of Title 21, U.S.C. §§841(a)(1) and 846.

Prior to trial the Government filed a Motion to Admit Similar Acts Evidence which was granted, over objection, and is appealed herein. Trial by jury commenced on September 21, 1984, before the Honorable James P. Churchill of the United States District Court for the Eastern District of Michigan, Northern Division. The trial resulted in Defendant's conviction on October 1, 1984.

Subsequent to his conviction, and prior to sentencing, Defendant dismissed his trial counsel and retained new counsel for sentencing and appellate purposes. On December 12, 1984, Defendant was sentenced to serve five years in a federal correctional facility, said sentence to begin on January 8, 1985.

Defendant filed a Notice of Appeal and on April 10, 1985, filed a brief on appeal raising the following issues:

I. Whether Appellant was denied his fundamental right to effective assistance of counsel as guaranteed by the Sixth Amendment to the U.S. Constitution.

II. Whether the trial court erred in granting the Government's Motion to Admit Similar Acts Evidence pursuant to F.R.E. 404(b).

III. Whether the trial court erred in allowing testimony of prior consistent statements pursuant to F.R.E. 802(d)(1)(B).

On April 10, 1985, Petitioner filed a Motion to Remand which was unopposed. The Motion sought an evidentiary hearing in District Court to develop the record on the ineffective assistance claim in Issue I of the appeal. On October 31, 1985, the Court of Appeals denied the Motion to Remand and suggested that Petitioner file a Motion for New Trial. The Court's Order stated in pertinent part:

> "The district court has jurisdiction to entertain the motion for new trial and either deny the motion on its merits or certify to the Court its intention to grant the motion. This Court would then entertain a motion to remand the case, not before."

Subsequent to the entry of this Order the Court held the briefing schedule in abeyance and ordered that Petitioner submit status reports as to the progress of the Motion for New Trial. Petitioner submitted the status reports as required and understood from the Order that the record would be transmitted to the Court of Appeals.

The District Court conducted hearings on Petitioner's Motion for New Trial, and on April 16, 1986, denied the Motion. On September 15, 1986, Petitioner filed a Motion to Allow Filing a Supplemental Brief which was denied on October 7, 1986. On December 4, 1986, Petitioner filed a Motion to Supplement the Record, which motion was granted. Oral arguments were had on January 26, 1987, however, reference to the record developed at the hearing on the Motion for New Trial was not allowed. The Court entered an Opinion affirming Petitioner's conviction on February 23, 1987. The Opinion did not thoroughly address Petitioner's Sixth Amendment effective assistance of counsel issue.

REASONS FOR ALLOWANCE OF THE WRIT

ISSUE I

THE REFUSAL OF THE COURT OF APPEALS TO FULLY DECIDE PETITIONER'S CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF PROCEDURAL IRREGULARITIES CREATED BY THE COURT DENIED PETITIONER DUE PROCESS AND THE EFFECTIVE ADMINISTRATION OF JUSTICE WHICH IS REVIEWABLE IN THE EXERCISE OF THE COURT'S SUPERVISORY POWERS.

A criminal defendant's right to appeal is the right to an effective appeal. A component of that right is the right to present all facts to the court in order that the court can fully review the issues presented on appeal.

In the present case, the Petitioner filed an appeal within the allowable time. The major issue on appeal was whether Petitioner was denied effective assistance of counsel. Defendant's argument asserted that his trial counsel violated his duty of loyalty to him as a client by entering into a relationship with the client's wife during the trial. The question of where trial counsel's loyalty existed affected trial counsel's entire representation of Defendant to the extent that it could not be relied upon to produce a just result as required by this Court's holding in *Strickland v. Washington*, 466 U.S. 668; 104 S.Ct. 2052, 2064 (1984).

After the appeal was filed Petitioner discovered an additional ground for finding ineffective assistance of counsel. That ground was the extent of the

development of a relationship between the client's wife and his trial attorney during and after the trial. It was necessary that testimony be taken to form the factual basis for this ground for appeal. That testimony was taken and was available to the Court of Appeals.

Contained in the transcript, which was made available to the Court of Appeals, the District Court Judge found:

> "But I'm going to find on this record that there was a relationship that developed between them, [Defendant's attorney and the client's wife] and that he [the attorney] hasn't been candid and honest with us and told us the truth about it." (Hearing Transcript, pages 514, 515).

In the District Court's Opinion, the Court stated:

> "The Court finds upon the total evidence by the Saturday following the defendant's conviction, defense counsel and the defendant's wife had mutually pursued an inappropriate personal relationship which probably

> reached fruition on Saturday night." (Court's Order and Finding of Facts Denying Motion for New Trial, p. 5).

Defendant's trial counsel admitted that what Defendant's wife told him may have altered his thinking about the kind of person the Defendant was. (Hearing Transcript, pgs. 422, 423).

The District Court Judge went on to discuss the applicable law. The Court stated:

> "The law of the land is succinctly set forth in *Strickland supra* wherein Justice O'Connor speaking for the majority of the Court said, "One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler v Sullivan*, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by

> conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed Rule Crim Proc 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and 'that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v Sullivan, supra. Id*, p. 6.

The District Court denied Defendant's Motion for a New Trial, however, the District Court believed that the record and Opinion would be made part of the record in the pending appeal. The Court expressed its understanding of the proceedings as follows:

"THE COURT: All right. If the motion is denied, then your appeal if I decide to grant the motion, then they probably will dismiss the appeal and send it back to allow me to grant the motion.

You may proceed." (Hearing Transcript, p. 466).

The Court even questioned the prosecutor as to the Government's right to appeal if Defendant's Motion were granted:

"THE COURT: [to the prosecutor] Tell me this. If I should grant their motion, do you have the opportunity under the circumstances of this case to appeal before a new trial is granted?

Can you appeal a motion for a new trial?

MR. HLUCHANIUK: [Prosecutor] I think so. I'm not sure, but I think so."

At the time of oral argument in the Court of Appeals the record was supplemented with this testimony, but counsel was not

allowed to refer to it. The Court's refusal to consider fully the threshold question of ineffective assistance of counsel and its suggestion that Petitioner raise the matter anew in a motion filed pursuant to Title 28, U.S.C. §2255 effectively denied the Petitioner his right to appeal.

The action of the Court of Appeals was all the more undermining of this right and the orderly administration of justice because the Court itself set up the procedures for holding the briefing schedule in abeyance and supplementation of the record. Further, the Court's action caused Petitioner's counsel and the District Court to believe that the testimony and findings of the District Court would be made a part of the record on appeal.

Since the Court had all the facts before it, it was error for the Court not to hear the matter fully and determine the issue on all of the facts. In the exercise of this Court's supervisory powers, this Court should vacate the Opinion of the Sixth Circuit and remand with instructions to have the issue of ineffective assistance of counsel fully

briefed and argued.

ISSUE II

THE AFFIRMATION OF PETITIONER'S CONVICTION BY THE COURT OF APPEALS WHERE THE PETITIONER IS DENIED A FAIR TRIAL DUE TO THE DISTRICT COURT'S ERROR IN INTRODUCING SIMILAR ACTS TESTIMONY UNDERMINES THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM.

Petitioner was charged with Conspiracy to Distribute Cocaine, in violation of Title 21, U.S.C. §§841(a)(1) and 846. The trial court erred when over objection it granted the Government's motion to admit similar act evidence in its case in chief.

Christopher Simon, an unindicted co-conspirator, testified that the Defendant had distributed quantities of marijuana to him on several occasions some five months prior to the beginning date of the conspiracy as alleged in the indictment.

Case law has well established that similar act evidence is not admissible under Federal Rules of Evidence 404(b)

unless it qualifies as an exception. Clear and convincing evidence must be offered to ensure that certain prerequisites are met by the Government prior to admitting such evidence. The Ninth Circuit in *United States v. Bailleaux*, 684 F.2d 1105, 1106, 1109 (9th Cir. 1982) recognized that:

> ". . . Courts must be extremely careful to guard against the danger that defendants will be convicted because they have previously committed a serious criminal offense rather than because the Government has introduced evidence sufficient to prove beyond a reasonable doubt that they are guilty of the offense for which they are being tried. This danger exists whenever a jury is advised of the fact of a prior conviction, or evidence relating to earlier criminal conduct is admitted . . ."

The *Bailleaux* court further held that before evidence of prior criminal conduct is admissible as an exception under Rule 404(b), the following prerequisites must be met:

(1) proof that the defendant committed the other crime must be clear and convincing;

(2) the prior criminal conduct must not be too remote in time from the commission of the crime charged;

(3) the prior criminal conduct must in some cases be similar to the offense charged;

and

(4) that the prior criminal conduct must be introduced to prove an element of the charged offense that is a material issue in the case. Id, at 1109, 1110.

The admission of the similar acts testimony in the present case violated the tests and standard set forth in *Bailleaux, supra*.

In the present case, the prosecutor failed: a) to present clear and convincing evidence that Petitioner committed the similar act crime. The only testimony regarding the act came from an unindicted co-conspirator, Christopher Simon, whose

credibility was suspect in the following particulars:

(1) As an unindicted co-conspirator, he had entered into a plea agreement with the Government to escape federal prosecution.

(2) Simon waited a considerable period of time after his arrest to identify Defendant as his source of drugs.

(3) His criminal record reflected a theft offense.

(4) Upon cross-examination he admitted his involvement in marijuana use and sale predating his acquaintance with Defendant.

b) to meet its burden of showing that the similar act was not too remote in time. Here, the prior act was some five months before the acts charged in the indictment; c) to meet its burden of proving that the prior act was similar to the charged offense. The prosecutor even admitted at trial that the two were different. Further, a transaction involving marijuana does not create a presumption

of dealing in other drugs which alone justifies the introduction of similar act testimony; d) to identify the material issue in the case for which the testimony was offered.

The Court failed to enforce the above requirements and failed to engage in the probative/prejudicial balancing test required by Federal Rules of Evidence 403. The Court's actions denied the Petitioner a fair trial.

The manner by which the District Court allowed the introduction of similar act testimony in the present case conflicts with the requirements set forth in *Bailleaux, supra*, and the requirements of Federal Rules of Evidence 403 and 404. The manner and method denied Petitioner a fair trial as it allowed the jury to believe and render a verdict on the belief that Petitioner was a person of bad character. The verdict therefore rests upon improper grounds and is antagonistic to this Court's decision in *Michelson v. United States*, 336 U.S. 469 (1948).

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges that the Petition for Writ of Certiorari be granted, or in the alternative, that the Opinion of the United States Court of Appeals for the Sixth Circuit affirming Petitioner's conviction be summarily reversed.

Respectfully submitted,

NICHOLAS SMITH, P.C.
By: /s/ NICHOLAS SMITH, P20697
Attorneys for Petitioner
16000 W. Nine Mile, Ste. 114
Southfield, MI 48075
(313)-557-5599

APPENDICES

APPENDIX A

TEXT OF STATUTES INVOLVED

§ 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute a counterfeit substance.

(Pub.L. 91-513, Title II, § 401, Oct. 27 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194.)

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the

maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub.L. 91-513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265.

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties, or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, 62 Stat. 928)

§ 2255. Federal Custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the grounds that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and files and records for the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(June 25, 1948, c. 646 Stat. 967; May 24, 1949, c. 139, § 114 63 Stat. 105.)

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
GEORGE E. SPAGNUOLO
Defendant-Appellant.

On appeal from the United States District Court for the Eastern District of Michigan, Northern Division.

Decided and Filed Feb. 20, 1987

Before: **ENGEL, KRUPANSKY and NORRIS, Circuit Judges.**

PER CURIAM. Defendant appeals his conviction of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846(1), rendered by jury verdict in the United States District Court for the Eastern District of Michigan. Defendant alleges that he was denied the effective assistsance of counsel, and that the District Court erred both in admitting similar acts evidence under Fed. R. Evid. 404(b) and in allowing testimony of prior consistent acts pursuant to Fed. R. Evid. 801(d)(1)(b).

On April 15, 1985, defendant filed a motion in this court to remand to the district court for an evidentiary hearing

to substantiate his claim of ineffective assistance of counsel. On October 31, 1985, this court denied the motion to remand for failure to conform with the procedural requirements of *First National Bank of Salem v. Hirsch,* 535 F.2d 343 (6th Cir.1976), and on December 2, 1985, it held briefing in abeyance pending a decision by the district court on defendant's motion for a new trial. The district judge denied that motion on April 16, 1986. While the record on appeal has been supplemented, there is no appeal before us from the denial of the defendant's motion for a new trial.

The record before us does not support the existence of a claim of denial of the effective assistance of counsel. Defendant is not precluded, however, from raising this issue in further proceedings under *Worthington v. United States,* 726 F.2d 1089 (6th Cir. 1984). We also find the defendant's other alleged error contentions to be without merit. Accordingly, the judgment of the district court is **AFFIRMED.**

APPENDIX C

ORDER DENYING PETITIONER'S SUGGESTION FOR REHEARING
(Filed May 7, 1987)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. ORDER No.85-1014

GEORGE E. SPAGNUOLO,

Defendant-Appellant.

Before: ENGEL, KRUPANSKY and NORRIS, Circuit Judges.

Defendant Spagnuolo has filed a motion to clarify this court's order of March 23, 1987 to the extent it did not respond to appellant's suggestion for rehearing.

Upon consideration, to the extent that such suggestion is a petition for rehearing, the same is **DENIED.**

Counsel is further reminded: That the filing of a petition for rehearing or suggestion for rehearing en banc are not prerequisites to the filing of a petition for certiorari. Rule 14(b) Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX D

ORDER DENYING MOTION TO REMAND
(Filed Oct. 31, 1985)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. ORDER No.85-1014

GEORGE E. SPAGNUOLO

Defendant-Appellant.

Before: **KEITH, KENNEDY AND MILBURN, Circuit Judges**

This matter is before the Court upon defendant-appellant's unopposed motion to remand.

Defendant was convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. § 846(1) and sentenced to five (5) years imprisonment and a $10,000 committed fine. On December 20, 1984, he timely appealed his conviction and sentence, raising a claim of ineffective assistance of counsel under *Strickland v. Washington* 104 S. Ct. 2052 (1984). On Apr. 12, 1985, defendant filed a motion to remand seeking an evidentiary hearing to substantiate his claim that his trial counsel: 1) failed to investigate records and use witnesses in support of an affirmative defense which defendant believed would be

asserted; 2) inadequately prepared defendant to testify; and 3) became involved with the defendant's wife during the trial.

Upon consideration of all the papers before the Court, we conclude that the motion to remand must be denied. Defendant did not file a motion in the district court for a new trial based upon newly discovered evidence, Rule 33, Federal Rules of Criminal Procedure, contrary to the procedures followed by this Court. *United States v. Blanton,* 697 F.2d 146, 147-48 n.3 (6th Cir. 1983). The district court has jurisdiction to entertain the motion for a new trial and either deny the motion on its merits or certify to this Court its intentions to grant the motion. This Court would then entertain a motion to remand the case, not before. *United States v. Cronic,* 104 S. Ct. 2039, 2051 n.42 (1984); *United States v. Phillips,* 558 F.2d 363 (6th Cir. 1977) (per curiam). *See also First National Bank of Salem, Ohio v. Hirsch,* 535 F.2d 343, 346 (6th Cir. 1976). Since defendant did not follow the appropriate procedure,

It is ORDERED that the motion to remand is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

Clerk

APPENDIX E

ORDER HOLDING BRIEFING IN ABEYANCE
(Filed Dec. 2, 1985)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. ORDER No.85-1014

GEORGE E. SPAGNUOLO

Defendant-Appellant.

Upon consideration of the motion of the appellant to hold briefing in abeyance pending a decision by the district court on a motion for a new trial,

It is **ORDERED** that the motion be, and it hereby is, **granted.** The appellant shall file a status report with this Court no later than sixty (60) days of the date herein.

ENTERED PURSUANT TO RULE 4(F)
RULES OF THE SIXTH CIRCUIT

/s/ JOHN P. HEHMAN

Clerk

APPENDIX F

ORDER STAYING MANDATE
(Filed Mar. 23, 1987)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. ORDER No.85-1014

GEORGE E. SPAGNUOLO

Defendant-Appellant.

Upon consideration, it is **ORDERED** that the motion to stay issuance of the mandate pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed until the date on which the movant's application for a writ of certiorari must be filed pursuant to 28 U.S.C. Section 2101 or Rule 20 of the Supreme Court Rules, as applicable. However, if within such time, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed, the stay shall continue until the final disposition of the case by the Supreme Court.

Upon the filing of a copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

Clerk

APPENDIX G

ORDER DENYING MOTION FOR NEW TRIAL
(Filed Apr. 16, 1986)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No.84-CR-10012-BC-01

GEORGE E. SPAGNUOLO

Defendant.

For reasons set forth in a memorandum opinion containing conclusions of fact and findings of law bearing this date,

It is **ORDERED** that defendant's motion for a new trial based upon claimed ineffective assistance of trial counsel be and the same is hereby **DENIED.**

/s/ JAMES P. CHURCHILL
JAMES P. CHURCHILL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 84-CR-10012-BC-01

GEORGE E. SPAGNUOLO,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO MOTION FOR NEW TRIAL

The defendant was convicted of Conspiracy to Distribute Cocaine. He was sentenced to five years imprisonment and a $10,000 committed fine. With his appeal pending, the defendant has filed a motion for a new trial. In an unpublished order, the Court of Appeals has stated that the District Court has jurisdiction to entertain the motion, and to either deny the motion or certify to the Court of Appeals its intention to grant the motion.

Based upon findings of fact and conclusions of law herein set forth, the Court will enter an order denying the motion for a new trial.

The defendant's motion for new trial is based upon the claim of ineffective assistance of trial counsel in four ways:

1. Failure of defense counsel to allow defendant to testify.

2. Failure to investigate potential witnesses and defenses.

3. A conflict of interest because of an inappropriate personal relationship between defense counsel and the defendant's wife.

4. Failure to request a cautionary instruction relative to similar-act evidence.

Mr. N. C. Deday LaRene was retained counsel. Mr. Nicholas Smith is appellate counsel and counsel on the motion for a new trial.

Although documents were filed in support of and in opposition to the motion, the defendant requested and was granted a full testimonial hearing. Testimony was heard on January 10, 1986, and March 28, 1986.

Mr. LaRene is an experienced attorney. He sought and obtained a substantial trial

delay so that he could he could give his full attention to this case after completion of a case being tried in Detroit. He sought and obtained the suppression of potentially harmful evidence. The trial itself was short, but was spread out over several days. The defendant lost the case because Mr. Michael Hluchaniuk, Assistant U. S. Attorney, skillfully and fairly introduced a substantial array of direct and circumstantial evidence of guilt which could not be overcome, and not because of any lack of skill, preparation or zeal by Mr. LaRene.

Except for the claim of conflict of interest, the motion for new trial borders on being frivolous. In fairness to Mr. Smith, the Court realizes that, but for the conflict of interests claim, the motion in all likelihood would not have been filed. Nevertheless, each claim has been given special consideration.
Although the Supreme Court in *Strickland v Washington*, 80 L.Ed 2d 674, 699 (1984), has suggested that it may be unnecessary or even inappropriate to determine whether counsel's performance was deficient before examining the result of the alleged deficiencies, it is appropriate to

reverse the suggested order of determination with respect to the claim of failure to allow the defendant to testify. The Court finds on the record made in the testimonial hearing that the decision not to testify was a strategic decision made by the defendant himself. It was made after weighing the advice of counsel and there is nothing in the record to suggest that counsel's recommendations concerning testimony were anything but sound or that they were unduly influenced.

A different approach is appropriate with respect to the inter-related claims of failure to investigate witnesses and defenses. The potential defenses suggested in the motion for new trial involved impeachment of the government's principal witness and the possibility of the offering of evidence concerning the defendant's character. Specifically, defendant claims that defense counsel failed to interview a specific list of potential witnesses. During cross examination by counsel for the government at the hearing, the defendant was unable to demonstrate, even with the benefit of hindsight, that any of the witnesses on

defendant's potential list would have been able to offer testimony which would have contributed to his defense. Because of Mr. LaRene's reputation and experience in representing criminal defendants in federal court, including defendants charged with controlled substance violations, he commands substantial fees. Perhaps an omission to seek out and interview certain suggested witnesses constitutes a breach of promise or expectation, but the Court is unable to find that there is a reasonable probability that the results of the trial would have been different had defense counsel interviewed each and every witness on the defendant's list.

The claim of ineffective assistance of counsel in connection with jury instructions was not briefed or argued by the defendant and fails as a matter of law. Clearly, strategy was involved in the decision not to have the Court point out to the jury the fact there was a similar act evidence received in the trial.

Apart from the defendant's conflict of interest claim, defendant's motion for a new trial based on the ineffective assis-

tance of counsel represents nothing more than the kind of hindsight attack upon strategy, tactics and judgment that could be made, post-conviction, in every case. The conflict of interest claim is unique. During the trial itself, the government presented evidence on a Monday, Tuesday and Wednesday. The defendant lived with his spouse in a suburb of Detroit. Defense counsel lived alone in a house that was located within a few minutes drive of the defendant's house. It was almost a two-hour drive from their homes to the courthouse in Bay City so the defendant, with his wife, spent Sunday, Monday, and Tuesday nights in a motel complex near Bay City. Defense counsel had an adjoining room each night. On Tuesday evening during the trial the defendant elected not to go out to dinner. Defendant's wife and defense counsel, without the defendant's objection, drove together to a nearby restaurant for dinner. A couple of hours after leaving the motel, they returned and she went to her husband's room. About noon on Wednesday, the trial was adjourned until the following Monday morning. The defendant, with his wife and defense counsel, checked out of the motel in Bay City and returned to their respec-

tive homes. One or more meetings occurred between the defendant and his attorney during the week. The defendant's wife called defense counsel at least twice during the Wednesday to Friday period without the defendant's knowledge. Also without his knowledge, defense counsel and the defendant's wife met in a restaurant for lunch on Friday.

The defendant and defense counsel checked back into the same motel on Sunday evening. The trial resumed on Monday. Before the day was over the jury returned a verdict of guilty. The defendant and defense counsel returned to their respective homes. On the Tuesday after the verdict, the defendant met defense counsel and gave him a $10,000 cash appeal fee. More phone calls were placed between the defendant's wife and defense counsel. During the week, she made definite plans to be away from home on Saturday night.

Early Saturday evening, she and defense counsel each drove to the same parking lot. She left her car, took a suitcase, and put it in his car. Together they traveled in his car to his home. She took her suitcase inside and they spent the

night alone at his home.
The Court finds upon the total evidence that by the Saturday following the defendant's conviction, defense counsel and the defendant's wife had mutually pursued an inappropriate personal relationship which probably reached fruition on Saturday night.

Mr. Nicholas Smith, who represents the defendant on the motion for a new trial and on appeal, in response to the Court's direct questioning, conceded that no claim is made that trial counsel's desire, motivation, or conscious effort to obtain an acquittal was in any way diminished by defense counsel's developing relationship with the defendant's wife during the trial. The Court also finds that defendant's confidence in the skill and loyalty of his attorney had not been lost by the Tuesday after the trial and there is no basis for a finding that the defendant's trial decisions or conduct were influenced by the inappropriate relationship which was to him unknown during the trial. There is no evidence to support a finding that the developing relationship influenced the trial strategy, the trial decisions, or the trial conduct of any-

one. The defendant's motion for a new trial must, therefore, be denied unless under the peculiar circumstances outlined above, a per se rule of prejudice exists.

The law of the land is succinctly set forth is *Strickland supra* wherein Justice O'Connor speaking for the majority of the Court said,

> "One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler v Sullivan*, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflict-ing interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed Rule Crim Proc 44(c), it is reasonable for the criminal justice system to maintain a

> fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that an actual conflict of interest adversely affected his lawyers performance." *Cuyler v Sullivan, supra.*"

80 L.Ed 2d at 696 (citations omitted)

Had the events of the Saturday evening following the defendant's conviction been proved to have occurred on the Saturday evening preceding the jury verdict, the Court would be at least impressed with the argument that it should have inferred that the lawyer's performance on Monday may have been effected by the inappropriate relationship, even in the absence of any other evidence. The Court does not draw such an inference from the series of communications that occurred between the defendant's wife and defense counsel before the last day of the trial. Accordingly, an order will be made denying the

defendant's motion for a new trial.

/s/ JAMES P. CHURCHILL
JAMES P. CHURCHILL
UNITED STATES DISTRICT JUDGE

APPENDIX H

INDICTMENT
(Filed March 22, 1984)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. Criminal No.84-CR-10012-BC-01

GEORGE E. SPAGNUOLO,
Defendant.

VIO: 21 USC 846 -- Conspiracy to Distribute Cocaine With Intent to Distribute

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THE GRAND JURY CHARGES:

That beginning approximately in July of 1982, and continuing until approximately September of 1982, within the Eastern District of Michigan, Northern Division, and elsewhere, GEORGE E. SPAGNUOLO, defendant herein, did knowingly, intentionally and unlawfully combine, conspire, confederate and agree with other persons whose names are both known and unknown to the Grand Jury, to commit an offense or offenses against the United States, that is, the attempt to possess with intent to distribute, to possess with intent to distribute and to distribute various quantities of cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Sections 841 (a) (1) and 846

of Title 21, United States Code.

It was a part of said unlawful conspiracy that GEORGE E. SPAGNUOLO would supply Christopher Simon with quantities of cocaine.

It was further part of said unlawful conspiracy that GEORGE E. SPAGNUOLO would maintain, store, process, and arrange for and/or distribute cocaine in the Cheboygan, Michigan area.

OVERT ACTS

In furtherance of said unlawful conspiracy, and to effect the objects thereof, the co-conspirators and defendant herein committed the following overt acts:

1. In July of 1982 a meeting took place between Christopher Simon and GEORGE E. SPAGNUOLO in Harbor Springs, Michigan.

2. On approximately August 18, 1982, Christopher Simon sold approximately .87 grams of cocaine to an undercover State Police Office.

3. On approximately August 23, 1982, Christopher Simon sold approximately 6.94 grams of cocaine to an undercover State Police Officer.

4. On approximately September 8, 1982, Christopher Simon sold approximately 156.81 grams of cocaine to an undercover State Police Officer.

All in violation of Title 21, United States Code, Section 846.

Dated: March 22, 1984

THIS IS A TRUE BILL

_____
Foreperson

LEONARD R. GILMAN
United States Attorney

By: _____
Michael J. Hluchaniuk
Assistant U.S. Attorney
204 Federal Building
P.O. Box 26
Bay City, Michigan 48707
(517) 895-5712

APPENDIX I

JUDGMENT AND ORDER OF COMMITMENT
(Filed Dec. 12, 1984)

UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

v. Docket No.84-10012-01

GEORGE E. SPAGNUOLO,

Defendant.

In the presence of the attorney for the government the defendant appeared in person on this date Dec. 12, 1984

COUNSEL:

WITH COUNSEL GREGORY BILL

FINDING AND JUDGMENT:

There being a verdict of GUILTY.

Defendant has been convicted as charged of the offense of

Conspiracy to distribute cocaine, 21 : USC: 846(1) as charged in one count indictment

The court asked whether the defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was

shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE OR PROBATION ORDER:

Five (5) years and a ten thousand dollar ($10,000) committed fine, under the provisions of 18:USC:4205(b) (2) which provides that the defendant may be released on parole at such time as the Commission may determine.

COMMITMENT RECOMMENDATION:

The court orders commitment to the custody of the Attorney General and recommends,

Defendant shall report to designated institution on January 8, 1985.

PREVIOUS BOND IS CONTINUED UNTIL JANUARY 8, 1985.

/s/ JAMES P. CHURCHILL
JAMES P. CHURCHILL

Dated: December 12, 1984